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NO. 81-283

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

LARRY VAN EMMERIK, and all others similarly situated,

Appellant,

v.

WILLIAM J. JANKLOW, Governor of South Dakota; MARK V. MEIERHENRY, Attorney General of South Dakota; DAVID VOLK, Treasurer of South Dakota; and R. VAN JOHNSON, Secretary of Revenue of South Dakota,

Appellees,

and

BLACK HILLS POWER AND LIGHT COMPANY; NORTHERN STATES POWER COMPANY; MONTANA-DAKOTA UTILITIES COMPANY; OTTER TAIL POWER COMPANY; NORTHWESTERN PUBLIC SERVICE COMPANY; and IOWA PUBLIC SERVICE COMPANY,

Appellees.

On Appeal from the Supreme Court of South Dakota

APPELLEES' MOTION TO DISMISS OR AFFIRM

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Pursuant to Rule 16, paragraphs 1(b) and 1(d) of the Revised Rules of this Court,

Appellees move that this appeal be dismissed or, alternatively, that the Judgment of the Supreme Court of South Dakota be affirmed.

STATEMENT

This is an appeal from an Order of the South Dakota Supreme Court quashing its own previously issued Alternative Writ of Prohibition and dismissing Appellant's petition for permanent Writ of Prohibition and Mandamus (State ex rel. Van Emmerik v. Janklow, 304 N.W.2d 700 (S.D. 1981)). The facts underlying the appeal are as follows:

The State of South Dakota since 1935 has imposed an occupational sales tax measured by the gross receipts of retailers. While the tax may be passed on to retail customers, there is no statutory requirement in South Dakota law that the retailer pass it on.

Collection remedies are provided against retailers who fail to pay the tax measured by gross receipts which includes all money or moneys

worth received in consideration of sales at retail. Deductions are not allowed for costs or any expenses; however, taxes paid on gross receipts by accounts found to be worthless and actually charged off for federal income tax purposes may be credited, provided that if such accounts are later collected the tax shall be paid on the amounts so collected. In other words, the tax is a retailer tax as opposed to a consumer sales tax.

A tax increase of one percent was levied in 1969 against utility companies as retailers of gas, electricity and water. While it is presumed the increase was passed on to consumers, it is a fact that the increase was remitted by the utility companies themselves, both investor owned, rural electric and municipal distributors.

This case had its origins in litigation commenced by Appellant in 1979. Appellant originally instituted a class action seeking a one percent refund of sales taxes from the State of South Dakota and from all retailers engaged in

the sale, furnishing or service of gas, electricity or water since January 1, 1976, which Appellant claimed were collected in excess of the rate imposed by SDCL 10-45-6. The utility companies eventually moved to dismiss because they had commenced an administrative action in June of 1979, seeking a similar one percent sales tax refund. Thereafter, Appellant moved to consolidate his action with the appeal taken to circuit court by the investor-owned utilities in the related administrative action following the denial of their applications for sales tax refunds by the Secretary of Revenue. On February 20, 1980, the Trial Court rendered judgment denying the relief sought in the investor-owned utilities case. Subsequently, on April 1, 1980, the Trial Court entered an order dismissing Appellant's complaint based upon its determination in the related case that the State had not collected a sales tax in excess of that imposed by statute.

Appellant and the investor-owned utilities then took separate appeals to the South Dakota Supreme Court. In the appeal of the investor-owned utilities, that Court concluded that the sales tax rate imposed by SDCL 10-45-6 was three percent and that the State had, since 1969, collected a sales tax in excess of the amount imposed by statute. It accordingly reversed and remanded for determination of a credit or refund to be adjusted in favor of the utilities pursuant to the provisions of SDCL 10-45-53. (See: In The Matter of the Appeal of the Sales Tax Refund Applications of Black Hills Power and Light Co., 298 N.W.2d 799 (S.D. 1980)). Appellant's appeal was decided the same day. In that case, the South Dakota Supreme Court held that, due to the doctrine of sovereign immunity, Appellant had no standing to seek a refund from the State either as a representative of his class or in his individual capacity. At the same time, it determined that Appellant was entitled to proceed

against the utilities to seek relief derivative of any remedy adjusted in favor of the utilities in the related litigation. (See: Van Emmerik v. State, 298 N.W.2d 804 (S.D. 1980)).

Following remand, and during the pendency of circuit court hearings in the two cases, the 1981 South Dakota Legislature enacted Senate Bill 40, entitled "An Act to provide for a retroactive and prospective sales tax increase on utility services, amusements and athletic events; to allow credit for taxes already paid, to validate and ratify the collection of prior taxes, and to declare an emergency."

This enactment, SB 40, now found as a Commission Note to South Dakota Codified Laws 10-45-6, passed in 1981 by a unanimous Senate (34-0) and House of Representatives (65-0) of the State of South Dakota and signed into law on January 30, 1981, as an emergency measure thereby making it effective on that date, provided for both a retroactive and prospective sales tax

increase on utility services, amusements and athletic events. The bill also allowed credit for taxes already paid by retailers to the State and it further validated and ratified the collection of prior taxes. The text of this law is found in the Jurisdictional Statement of Appellant (pages 2-7) and will not be repeated in this Motion. A brief resume of that Act, however, is considered appropriate with respect to the Appellee's Motion to Affirm Or, in the Alternative to Dismiss.

Section 1 of that Act sets forth in some detail the Legislative Declaration concerning the serious emergency within the state resulting from the decisions of the South Dakota Supreme Court with respect to the rate of sales tax on utility services and amusement events, including the impairment of the fiscal integrity of the State as well as relating the denial of basic services of government in the event of refund or the requirement to pay additional taxes to replace revenues lost to the state treasury.

Sections 2 and Section 3 amend the basic rate with respect to utilities. South Dakota Codified Laws 10-45-6. Section 2 raises the rate from three percent to five percent and Section 3 raises the three percent rate to four percent. It will be noted later how these sections are time phased into the retroactive and prospective changes.

Section 4 raises the three percent rate with respect to athletic and amusement events provided by SDCL 10-45-8 to four percent.

Section 5 operates with respect to the retroactive characteristics of Section 2 and makes the tax effective from July 1, 1969 through May 1, 1980 (at this point in time a special one percent railroad acquisition tax went into effect), and again effective after the railroad tax increase was removed by operation of law or by certification of the Secretary of Revenue.

Section 6 made the five percent utility tax of Section 3 effective commencing with the

imposition of the railroad tax until such time as the railroad tax was removed.

Section 7 made the amusement and athletic event tax retroactive at four percent from July 1, 1969.

Section 8 of the law, significantly important from a standpoint of the validity of a retroactive tax, protected retailers who, because of the uncertainty in various tax rates, may not have collected the full amount of tax at the time it was remitted to the State. That section provides that these retroactive taxes are only effective to the extent that the taxes were theretofore collected by the retailer. In order to provide full credit, that section also provides that any tax which the retailer had theretofore paid under the utility tax law, SDCL 10-45-6, or the athletic and amusement tax law, SDCL 10-45-8, shall be credited to the tax imposed by Sections 2, 3 and 4 of the Act. Thus, whatever tax was paid within the appropriate rate structure is the

tax that was at the time of adoption of this law then owing; there is no further tax liability under it by any retail taxpayer and consequently no tax for that retail taxpayer to pass on to any customer.

Section 9, another important section with respect to validity of a retroactive tax, is the ratification section which validates the prior collection of taxes which was effectuated before the passage of the act.

Sections 10 and 11 contain procedural clauses with respect to enactments in South Dakota, the first being a severability clause expressing legislative intent in the application of its provisions and the second being an emergency clause making the bill fully effective on the date it was signed by the Governor.

In the earlier tax refund proceeding brought by the utility companies through an administrative proceeding and hearing in Circuit Court, the South Dakota Supreme Court, after

reversing the trial court in that Court's finding that the Legislature had in fact increased the tax to utility companies by one percent since 1969, remanded the matter for a determination of a credit or refund for such utility companies pursuant to the provisions of South Dakota law, SDCL 10-45-53. That section provides where it appears that an amount of tax was paid which was not due, whether as the result of a mistake of fact or an error of law, the amount overpaid should be credited against any tax due or to become due from the person who made the erroneous payment or refunded to such person if the claim for refund was filed with the Secretary of Revenue within three years after such erroneous payment was made.

In the old Van Emmerik case, Van Emmerik v. State, 298 N.W.2d 804 (S.D. 1980) the South Dakota Supreme Court held at 806:

> Refunds may be claimed only by "the person who made the erroneous payment.'" The retail sales tax in this case is the liability of the retail utility

> companies and not the ultimate consumer. In Northwestern National Bank of South Dakota v. Gilles, 82 S.D. 457, 461, 148 N.W.2d 293, 295 (1967) we stated: S.D.C. 57.3201 clearly imposes the sales tax on the retailer. The court so determined in State ex rel. Sioux Falls Motor Co. v. Welsh, 65 S.D. 68, 270 N.W. 852, when it wrote:
>
> The fact must be kept in mind that the tax with which we are dealing is an excise or privilege tax imposed upon the privilege of engaging in an occupation. It is not a tax upon gross receipts as such, but gross receipts ***is used as a measure to determine the amount of tax to be paid for the privilege of engaging in an occupation or business.

The court thus held that the tax was clearly imposed upon utility retailers (Id. at 807) and that the only person who could make an erroneous payment and hence seek a refund or credit from the state was the utility company. The State did not waive its sovereign immunity beyond the three year period and the action could not be maintained against the State. The Court concluded "Appellant (Van Emmerik) lacks standing to seek a sales tax refund on his own behalf. That want of standing also applies to the appellant class."

The final determination by the South Dakota Supreme Court in Van Emmerik I was that the only remedy available for the ultimate consumer, if any remedy was available, was a remedy which is "derivative of such credit or refund" of the utility. The Court at 807 stated:

> What we have concluded concerning sovereign immunity does not apply to the action against the investor-owned utilities, which seeks a one percent refund from the utilities for all South Dakota residents who, over a three-year period, have paid a four percent sales tax on certain utility charges. Due to our decision in the related appeal that, upon remand, the utility retailers are entitled to a credit or refund subject to the three-year limitation imposed by SDCL 10-45-53, it follows that any relief in the present case must come from the utilities, since any remedy available here is derivative of such credit or refund. The manner in which the consumer class and the utility companies are described in the pleadings in this case indicates that the relief appellant seeks does not exceed the credit or refund that will be adjusted to the utilities in the related litigation.
>
> The order of the circuit court is affirmed to the extent it dismissed appellant's action aginst the State, but is reversed insofar as it dismissed appellant's action against the utility companies. The case is remanded accordingly.

ARGUMENT

The appeal here should be dismissed or in the alternative the order quashing the alternative writ of mandamus of the South Dakota Supreme Court should be affirmed on the following basis:

1. There is an insubstantial federal question involved and no one, whether it be the utility companies themselves or the customers of the utility companies, has the slightest possibility of receiving any monetary benefit.

2. As an additional basis for dismissal or affirmance under Rule 16.1(d) this entire proceeding seeks only to benefit the attorneys for the Appellant through the establishment of a fund for their legal fees which they have already set at $280,000 and which attempt has been rejected by a state circuit court.

In support of such argument the Appellees submit the following:

Appellant has stated three objectionable results to the retroactive enactment of the South Dakota Legislature. (Appellant's brief page 11.) These are:

(a) To nullify the final judgment of the South Dakota Supreme Court in judging a tax refund to be due and to abrogate all rights of the plaintiff class to the proceeds of that judgment;

(b) To wipe out all claims of the plaintiff class against all of the utility companies in South Dakota which are asserted in Van Emmerik II; and

(c) To bar all claims for refund against the State of South Dakota by other utility companies.

Appellant seems to proceed from the conclusion that somehow there is a class of people headed by Van Emmerik which is entitled to some sort of nameless refund. The Supreme Court, however, in the case here appealed from noted (Van Emmerik, 304 N.W.2d at 706 n. 4):

> Petitioner (Appellant) conceded in oral argument that no final, enforceable judgment in his favor exists.

The Court also noted that the Petitioner (Appellant) does not assert that there is a final, unreviewable determination even concerning his rights following from the seminal litigation, that is the case of Van Emmerik I, or the Sales Tax Refund Case.

The action of the South Dakota Legislature in levying a retroactive tax in lieu of payment of refund claims succeeded in avoiding a revolving monstrosity. Had the legislature appropriated money and levied a tax to meet that appropriation, the new tax would have been against the same people who theoretically would be the recipients of the refund claims. In order then for the State to make a refund to perhaps two hundred thousand householders, it would first have to levy a tax of fifty million dollars on those same householders. The cost of collecting the tax and paying attorney's fees is conservatively estimated at five million dollars.

It should likewise be noted that the people who Appellant urges would be the beneficiaries were also the beneficiaries of the tax impositions and expenditures since 1969, all of which went into the State General Fund and were appropriated by the elected representatives of the people for state and local purposes.

As to wiping out the claims of the plaintiff class, against the utility companies, (Appellant Argument (b)), the South Dakota Supreme Court disagreed with this contention stating in Van Emmerik II, supra at 705:

> Petitioner (Appellant) claims that SB 40 has thus impermissibly stripped him of an absolute vested right to recover for the sales tax overcharges that the Act attempts to ratify.
>
> We disagree.

3. Even if it is assumed that the Petitioner's right to recover was in some sense vested, that right is nevertheless subject to the equities existing against it. United States v. Henszen and Company, 206 U.S. at 386-87, 27

S.Ct. at 747, 51 L.Ed. at 1104. It is apparent here that Petitioner's asserted right is not based on any substantial equity. The unauthorized tax had been mistakenly collected without interruption since 1969 and Petitioner presumably shared in whatever public benefits the tax funded. Where an asserted vested right that is not linked to any substantial equity arises from the mistake of officers purporting to administer the law in the name of the state, the legislature is not prevented from curing the defect in administration simply because the effect may be to destroy claims that would otherwise exist. Graham and Foster v. Goodcell, 282 U.S. 409, 51 S.Ct. 186, 75 L.Ed. 415 (1931).

Appellant also alleges that this action would have the effect of barring all claims for refund against the State of South Dakota by other utility companies (Appellant Argument (c)). In response, the Appellees contend that this retroactive legislation is a curative act, ratifing the

past imposition of a specific tax rate, and correcting a technical defect in the statute. This legislation was adopted in such a manner as not to be so harsh and oppressive as to transgress the United States Constitution. In addition, the intention of the legislature to pass a retroactive tax is clearly expressed. Welch v. Henry, 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87 (1938).

Therefore while the claim for refund by other utility companies is effectively nullified, the passage of a retroactive tax eliminates the need for those same utility companies to collect the refund and pass it on to the Appellants in this action. That utility companies do not benefit from Appellant's claims is made evident by the fact that utility companies are Appellees rather than Appellants in this action.

CONCLUSION

Therefore, it is Appellees' contention that, in view of the following facts, Appellant has

not stated a substantial federal question: (1) the class of taxpayers who will receive any declared refunds are the same taxpayers who will be taxed to pay the refund, (2) the class of taxpayers who will receive the declared refunds benefitted from the public benefits which the original tax funded, and (3) the $50,000,000 refund is approximately one third of the State's tax revenues in the present fiscal year.

STATEMENT OF CONCURRENCE

I am authorized to state that Vincent J. Protsch, Attorney for the South Dakota Rural Electrical Association and Robert B. Frieberg, Attorney for the South Dakota Municipal Electrical Association, parties Amicus Curae in the proceeding in the South Dakota Supreme Court from which this appeal is being taken, on behalf of such Associations, join Appellees William J. Janklow, Mark V. Meierhenry, David Volk, and R. Van Johnson in this Motion to Dismiss or in

the alternative to affirm the Judgment of the South Dakota Supreme Court.

Respectfully submitted,

MARK V. MEIERHENRY
ATTORNEY GENERAL

Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the Appellees' Motion to Dismiss or Affirm in the matter of Larry Van Emmerik v. Janklow, et al. were served by United States mail, first class, postage prepaid upon Mr. Robert B. Frieberg, Beresford, South Dakota 57004; Mr. Alan F. Glover, Box 686, Brookings, South Dakota 57006, Mr. Brent Wilbur, May, Adam, Gerdes & Thompson, 503 South Pierre Street, Pierre, South Dakota 57501; Mr. Gale E. Fisher, Attorney at Law, 208 Court House Plaza, Sioux Falls, South Dakota 57101; Mr. George A. Bangs, Bangs, McCullen, Butler, Foye & Simmons, 818 St. Joe Street, Rapid City, South Dakota 57701; Mr. Jack Grieves, Winner, South Dakota 57580; Mr. David Morrill, Box 8108, Rapid City, South Dakota 57709; Mr. Robert Haeder, Box 1414, Huron, South Dakota 57350; Mr. Leo P. Flynn, Box 505, Milbank, South Dakota 57252; Mr. Ellsworth F. Wilkinson, 103 2nd Street, S.E,

DeSmet, South Dakota 57231; and Mr. Vincent J. Protsch, Attorney at Law, Howard, South Dakota 57349 on this 10th day of November, 1981.

MARK V. MEIERHENRY
ATTORNEY GENERAL